
OPINION OF THE PUBLIC ACCESS COUNSELOR

TIM A. MILLIKAN,
Complainant,

v.

TOWN OF INGALLS,
Respondent.

Formal Complaint No.
18-FC-140

Kristopher L. Cundiff¹
Deputy Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Town of Ingalls violated the Open Door Law² and the Access to Public Records Act.³ Attorney Gregg H. Morelock filed an answer to the complaint on behalf of the council. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received

¹ Attorney in active good standing, duly admitted to the practice of law in the State of Indiana.

² Ind. Code §§ 5-14-1.5-1 to -8

³ Ind. Code §§ 5-14-3-1, to -10

by the Office of the Public Access Counselor on December 4, 2018.

BACKGROUND

This case involves a public access dispute between the Town of Ingalls and its former Town Manager. Ingalls previously employed Tim A. Millikan (“Complainant”) as Town Manager. At 7:00 p.m. on November 5, 2018, the Ingalls Town Council held an executive session at the Ingalls fire station in accordance with Indiana Code Section 5-14-1.5-6.1(b)(6). After the executive session, the Council convened a special a meeting and voted four to one to fire Millikan.

On December 5, 2018, Millikan filed a formal complaint⁴ with this Office asserting Ingalls violated the Open Door Law (“ODL”) and the Access to Public Records Act (“APRA”).

Millikan’s ODL complaint centers on an executive session and special meeting the Council convened on November 5, 2018. First, Millikan contends the Council’s public notice did not include an address for the volunteer fire department, which is where the council held both meetings. Second, Millikan argues the notice failed to include a start time for the council’s special meeting. Third, he says Ingalls failed to post an agenda or notice at the fire station. Finally, Millikan argues that the location of the meeting is not ADA compliant.

⁴ John K. Triller filed a formal complaint contemporaneously with Millikan. Triller also asserts that the public notice for the special meeting violates the Open Door Law because it lacked a start time. Triller’s complaint is consolidated with Millikan’s complaint.

Additionally, Millikan contends that Ingalls violated APRA by denying him access to certain public records he requested. Specifically, Millikan asserts that he appeared in person on November 13, 2018, at the town office to orally request the following:

1. Copy of the approved Executive Meeting minutes from November 5, 2018;
2. Copy of the approved Special Meeting minutes from November 5, 2018;
3. Copy of draft of all minutes from the November 12, 2018 water and town meetings

Two days later Millikan followed up with the Ingalls Clerk-Treasurer by email acknowledging receipt of the documentation of the second request while noting the remainder of his request had not been fulfilled.⁵ The Clerk stated he had not had time to scan or finish the minutes from the November 12 meetings.

Millikan filed a formal complaint with this office on December 4, 2018.

On January 8, 2019, Ingalls filed a response with this office. In the response, the Town addresses the Open Door Law complaint but not the Access to Public Records complaint. For its part, the Town argues that the location of the meeting notice was sufficient because Millikan had been the Town Manager for several years and knew exactly where the lone fire station in Town is located. Furthermore, the Town argues the fire station where the meeting occurred

⁵ Millikan also stated, among other things, his view that “there is a concerted blackballing effort to withhold legally required responses and production for requests...”

was ADA compliant and no one with a disability was prohibited from attending.

ANALYSIS

1. The Open Door Law (ODL)

It is the intent of the Open Door Law (“ODL”) that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* Ind. Code § 5-14-1.5-1. Accordingly, except as provided in section 6.1, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. *See* Ind. Code § 5-14-1.5-3(a).

The Town of Ingalls is a public agency for purposes of the ODL; and thus, subject to the law’s requirements. Ind. Code § 5-14-1.5-2. The Ingalls Town Council is a governing body of the town for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). As a result, unless an exception applies, all meetings of the Council must be open at all times to allow members of the public to observe and record.

1.1 Public Notice

As set forth above, Millikan argues the town provided inadequate public notice for the council’s executive session and special meeting.

Under the ODL, the governing body of a public agency must give public notice of the date, time, and place of any meet-

ings, executive sessions, or of any rescheduled or reconvened meeting at least 48 hours—excluding weekends and legal holidays—before the meeting as follows:

The governing body of a public agency shall give public notice by posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held.

Ind. Code § 5-14-1.5-5(b)(1). Millikan contends the Town provided defective notice because the notice did not contain the address of the meeting location and did not include a start time for the special meeting. He also contends that the town failed to post the notice on the exterior of the fire station on the night of the meetings.

The plain language of the ODL mandates a public notice to include, among other things, the *time* and *place* of the meeting. It also states that a public agency must give notice by posting a copy of the notice at the *principal office* of the public agency holding the meeting or, if no such office exists, at *the building* where the meeting is to be held.

1.11 Time and Place

Here, the public notice includes the date—November 5, 2018—for both the executive session and the special meeting. It also includes the start time—7:00 p.m.—for the executive session. Additionally, the notice states that the special meeting “will follow” the executive session.

So, does the phrase “will follow” constitute a *time* for the special meeting for purposes of public notice under the ODL?

The answer is no.

A public notice in this context should state the start time of a meeting in hours and minutes. The idea is to put the public on notice of when the meeting is taking place.

The Indiana Court of Appeals recently observed that a public notice indicating a meeting would begin at “7:00 p.m. or immediately following the Executive Session, whichever comes later” did not satisfy the ODL’s notice requirement. *Warren v. Bd. of Sch. Trustees of Springs Valley Cmty. Sch. Corp.*, 49 N.E.3d 559, 567 (Ind. Ct. App. 2015). There, the court reasoned that the phrase “whichever comes later” did not constitute “a concrete time from the public’s perspective.” 49 N.E.3d 559 at 567.

Similarly, in this case, the phrase “will follow” is not a concrete time. Does it mean thirty minutes? Two hours? Next week? The law contemplates including a time (e.g., 8:00 p.m.) on every public notice. This Office recommends such a change going forward.

Millikan also contends the public notice is defective because it failed to include the address of the fire station where the Council held the meetings. The ODL requires a public agency to include the *place* of any meeting or executive session on the public notice.

Here, the notice identifies “the fire station” as the place of the council’s meetings. In this case, that is enough for purposes of public notice under the ODL.

Undoubtedly, there are circumstances where an address would be necessary to know the *place* where a meeting is happening (e.g., a larger municipality with more than one fire station). That is not the case here. The fire station is a

specific place in Ingalls from the public's perspective. Moreover, Ingalls is a small town and Millikan previously served as the Town Manager so it is reasonable to conclude that the omission of the address of the fire station across the street did not deny or impair his or the public's ability to observe and record the public meeting.

Because the Town identified a specific, concrete location in the public notice, it satisfied the requirement of the ODL. That stated, there is no prohibition on including the address of a meeting location on a public notice. In this context, more information is generally better.

1.12 Location of Posted Notice

Millikan also asserts that the town violated the ODL by posting the notice at Town Hall instead of the fire station. As set forth above, a public agency must give notice by posting a copy of the notice at the *principal office* of the public agency holding the meeting or, if no such office exists, at *the building* where the meeting is to be held.

Millikan has not argued that a principal office does not exist in the Town of Ingalls, which is a necessary condition for notice to be posted at the fire station in this case.

Liberally construing the law, it stands to reason that the principal office of the Town of Ingalls is Town Hall. Therefore, posting notice at Town Hall for the Council's meetings is permissible.

1.2 Meeting Agenda

Millikan also asserts that the Town failed to post an agenda on the exterior of the fire station on the night of the meeting. Although the Town concedes that it did not post an

agenda on the night of the meetings, it argues that it did not use an agenda so it was not required to post one.

Under the ODL, *if* the governing body uses an agenda, the agenda must also be posted at the entrance to the meeting location before the meeting. Ind. Code § 5-14-1.5-4(a)(emphasis added).

The ODL does not, however, specify what agenda items are required. Even so, the statute specifically provides that “a rule, regulation, ordinance, or other final action adopted by reference to agenda item alone is void.” *Id.*

Here, the Town contends that it did not use an agenda, which is why it did not post one at the location of the meeting. The Public Access Counselor has previously interpreted Indiana Code Section 5-14-1.5-4(a) to require those public agencies that *regularly use* an agenda to post one. So, if the Town Council, during the ordinary course of business, uses an agenda, then it should have posted the agenda on November 5, 2018. The reverse is also true.

Millikan did not argue or present any evidence that the Town typically uses an agenda but suddenly failed to on the night in question.

As a result, based on the information presented, the lack of agenda does not constitute a violation of the ODL in this case.

1.3 Accessibility to Individuals with Disabilities

Millikan also asserts that the Town violated the ODL because the Ingalls fire station is not an “ADA Program Transition Compliant Facility.” In disputing this claim, the

Town contends that the fire station is ADA compliant because it has “huge overhead doors leading direction into the meeting space, which would allow anyone access to the space despite any mobility issues.” What is more, the Town contends that meetings can be held anywhere accessible to the public, and “the ODL does not prohibit a public agency from holding a meeting at a location inaccessible to an individual with a disability.”⁶

Under the ODL, a public agency may not hold a meeting at a location that is not accessible to an individual with a disability. Ind. Code § 5-14-1.5-8(d). Notably, the definition of “public agency” under Section 8(a) is narrower than the general definition under the ODL.⁷ Towns are not included in narrower definition of “public agency” under Section 8.

As a result, this section does not apply to Ingalls for purposes of finding an ODL violation. That stated, any reasonable accommodation request should be granted and it is generally good government practice that meetings be accessible to all members of the public despite the black letter of the law. In any event, even if true, Millikan does not present a credible argument as to how he was denied public access by the facility being out of compliance with the ADA. He also did not assert why he has standing to meet the

⁶ The Town erroneously attributes this quote to page 11 of the *Handbook on Indiana’s Public Access Laws*, which is published by this office. In truth, the handbook states the ODL *does prohibit* a public agency from holding a meeting at a location inaccessible to an individual with a disability. This is located on page 12 of the updated Handbook published in January 2017 and posted at www.in.gov/pac.

⁷ This section applies only to a public agency described in section 2(a)(1) and 2(a)(5) of this chapter. *See also, Opinion of the Public Access Counselor*, 09-FC-235 (2009).

standard for grounds for a complaint. Therefore, Millikan's argument here must fail.

2. The Access to Public Records Act ("APRA")

As set forth above, Millikan asserts that the Town has violated the Access to Public Records Act by failing to provide him with certain meeting minutes he requested.

Millikan contends that he orally requested the records in person on November 13, 2018, and the town Clerk indicated he would provide them later that day. Two days later he followed up via email and text with the Clerk acknowledging that he received the minutes from the November 5, 2018, special meeting but nothing else.

Under APRA, meeting memoranda or minutes are public record. The Open Door Law specifically provides that the memoranda are to be available within a *reasonable period of time* and the minutes, if any, are to be open for public inspection and copying. Ind. Code § 5-14-1.5-4(c). Indeed, reasonable period of time is not defined by the Act. *Id.*

Although this part of the complaint was difficult to follow, it appears as if the Town Clerk previously would have minutes ready sometime around the morning after the meetings took place. That does not seem to be the case for the meetings in question.

Still, the law mandates the development of a memoranda or minutes within a reasonable time after the meeting is conducted. Typically, a public agency takes no longer than a couple of weeks to accomplish this task. The law does not, however, specifically contemplate the notion of draft

minutes or even the ratification of minutes at a subsequent meeting, although that is standard practice.

The law merely states that the minutes are to open for public inspection and copying. It matters not if they are in draft form. Once they are created – within a reasonable period of time after the meeting – they should be available upon request.

In its response, the Town did not dispute or even reference Millikan's APRA complaint. At the time of filing this complaint, the Town was still arguably in the "reasonable period of time" for producing the memoranda or minutes for inspection and copying. That stated, if the Town has not yet produced the meeting memoranda from the executive session conducted on November 5, 2018 and requested by Millikan eight days later, then Ingalls is in violation of APRA. If it has not already done so, the Town should provide the requested records as soon as practicable. Requests for meeting memoranda and minutes are among the most routine requests a public agency will receive and should not take months to complete.

CONCLUSION

Based on the foregoing, it is the conclusion of the Deputy Public Access Counselor that the Town of Ingalls committed a technical violation of the Open Door Law by failing to include a start time for the Council's special meeting on November 5, 2018. The Town should include a concrete start time on public notices for all public meetings going forward.

The remainder of the Complainant's grievances do not, in the opinion of this Office give rise to substantiated violations of the Open Door Law. While technocratic adherence to the law is always recommended, an action by a governing body will only be reversed by a trial court if the meeting so departs from the Open Door Law that the public has been prejudiced to a significant degree. That does not appear to be the case based upon the information provided and the non-compliance alleged by the Complainant.

Additionally, if the Town has not yet provided copies of the records requested by the Complainant on November 13, 2018, the Town is in violation of the Access to Public Records Act. This Office recommends the Town provide copies of all requested minutes to the Complainant if it has not done so already.

Notably, and in closing, any judicial remedy to issue injunctive relief or civil penalties has long since expired as the statute of limitations for obtaining such a judgment would have

elapsed in December. A Complainant can file a lawsuit seeking such a remedy regardless of whether a formal complaint is pending before the Public Access Counselor.⁸

A handwritten signature in black ink that reads "Kristopher Cundiff". The signature is written in a cursive style with a large initial 'K' and a long, sweeping underline.

Kristopher L. Cundiff
Deputy Public Access Counselor

⁸ Ind. Code § 5-14-1.5-7(b)(2).